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From: Zak J Ritchie <zak.j.ritchie@wvago.gov>
Sent: Friday, December 05, 2014 3:09 PM
To: Gottesman, Larry; Niebling, William
Cc: FOIA HQ
Subject: WV FOIA Response Letter
Attachments: WV - FOIA Response - FINAL 12-05-2014 (M0051762xCECC6).pdf

Dear sirs:

Please see the attached letter in connection with FOIA Request Number EPA-HQ-2015-000890.

Thank you,
J. Zak Ritchie

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State of West Virginia
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December 5, 2014

Via Certified Mail & Email

Mr. Larry F. Gottesman
National FOIA Officer
Environmental Protection Agency HQ
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Gottesman.larry@Epa.gov

Mr. William Niebling
Senior Advisor for Congressional
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Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 6101A
Washington, D.C. 20460
Niebling.william@Epa.gov

Re: Request Number EPA-HQ-2015-000890

Dear Messrs. Gottesman and Niebling:

We write in response to two letters regarding the above Freedom of Information Act ("FOIA") request: (1) the letter of Mr. Gottesman, dated November 5, 2014, which addresses the denial of our fee waiver request ("Gottesman Letter"); and (2) the letter of Mr. Niebling, dated December 3, 2014, which seeks a clarified description of our request ("Niebling Letter"). Our fee waiver request was submitted in connection with our FOIA request, dated October 17, 2014,

seeking copies of records regarding EPA's 2011 Settlement Agreement, Docket Number EPA-HQ-OGC-2010-1057. *See* Exhibit A.

In the present letter, we resubmit *both* the fee waiver request *and* the October 17 request for information under the FIOA (with three minor modifications noted below). *See* Exhibit A. This letter further elaborates why EPA is required by law to grant a fee waiver, and also explains why our request is sufficiently clear. Accordingly, we ask that you both grant the resubmitted waiver request and disclose all responsive documents to the resubmitted FOIA request, no later than 20 business days from the receipt of this letter, as required by FOIA. We seek all responsive documents, but would agree to a rolling production in order to facilitate our request.

The Gottesman Letter

The fee waiver request that we submitted on October 17, 2014, easily meets the standard for a FOIA fee waiver. "FOIA's fee waiver provision states that documents requested from a government agency 'shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'" *Perkins v. U.S. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Where the requesters are public officials with no "commercial interest[s]," as here, a fee request must be given a liberal construction. *See id.*; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1284 (9th Cir. 1987) (the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters"). The *only* question here is whether release of the information requested will be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *accord* 40 C.F.R. § 2.107(l). The request satisfies all four factors on that question in EPA's FOIA rules:

Factor 1: The subject of the request.

The first factor is "whether the subject of the requested records concerns '*the operations or activities of the government*.'" 40 C.F.R. § 2.107(l)(2)(i) (emphasis added). The subject of the requested records is the 2011 Settlement Agreement, EPA-HQ-OGC-2010-1057, as more fully described in our request. *See* Exhibit A. EPA is a party to the 2011 Settlement Agreement, which imposes specific and identifiable obligations on EPA. *See id.* Therefore, the 2011 Settlement Agreement unmistakably "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Factor 2: The informative value of the information to be disclosed.

The second factor asks "[w]hether the disclosure is '*likely to contribute*' to an understanding of government operations or activities." *Id.* § 2.107(l)(2)(ii) (emphasis added). The disclosure of records sought in our request, which directly relate to the 2011 Settlement

Agreement, are “likely to contribute” to an understanding of government operations or activities because the public is directly affected by EPA’s specific obligations under the 2011 Settlement Agreement. *Id.* § 2.107(l)(2)(ii); *see* EPA-HQ-OGC-2010-1057; Exh. A. The 2011 Settlement Agreement committed EPA to propose standards of performance under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, for new, modified, and existing power plants that include emission standards for carbon dioxide. *See* Docket Nos. EPA-HQ-OGC-2010-1057-0002; EPA-HQ-OGC-2010-1057-0036. To this point, EPA has adhered to this agreement, proposing standards of performance for new coal-fired power plants (79 Fed. Reg. 1430 (Jan. 8, 2014)), modified coal-fired power plants (79 Fed. Reg. 34,960 (June 18, 2014)), and existing coal-fired power plants (79 Fed. Reg. 34,830 (June 18, 2014)). The requested records will be “meaningfully informative” about EPA’s “operations or activities” because they will “increase[] [the] public understanding” regarding how and why EPA arrived at the 2011 Settlement Agreement and how EPA views its obligations thereunder. 40 C.F.R. § 2.107(l)(2)(ii).

Factor 3: The contribution to an understanding of the subject by the public.

The third factor is “[w]hether disclosure of the requested information will contribute to ‘public understanding.’” 40 C.F.R. § 2.107(l)(2)(iii) (emphasis added). Here, the disclosure will undoubtedly contribute to a “public understanding” of a “reasonably broad audience of persons interested in the subject” because all documents received pursuant to our request will be made public. *Id.* West Virginia will make all documents disclosed by EPA available to the general public, both in hard copy form at the main office of the Attorney General of West Virginia, and on the West Virginia Attorney General’s website, free of charge. *See generally* <http://www.ago.wv.gov/publicresources/epa/Pages/default.aspx>. As the chief legal officer of the State of West Virginia who is directly elected by the People, the West Virginia Attorney General has the “ability and intention to effectively convey information to the public.” *Id.* § 2.107(l)(2)(iii). *See* W. Va. Const. art. VII, § 1.

Factor 4: The significance of the contribution to public understanding.

The fourth factor is whether “the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv) (emphasis added). The contribution of the information requested, which relates to the implementation of the 2011 Settlement Agreement as more fully described in our request, is likely to “significantly” benefit the public understanding of EPA’s “operations or activities.” *Id.* To begin, because the 2011 Settlement Agreement is at least a significant factor that led to EPA’s current proposed regulations of power plants under Section 111 of the Clean Air Act, public disclosure of information regarding this subject is critical to the public awareness of how and why EPA decided to regulate power plants in this way. The requested information is the only source for the public regarding the agency’s decision to make a legally binding commitment to propose and finalize rules that will affect thousands of jobs in the coal mining and power generation sectors, and will directly influence the generation of electricity and the regulation of public utilities.

The Niebling Letter

Our October 17 FOIA request reasonably describes the documents we are seeking, which will permit EPA officials to identify and locate those documents. Under the FOIA, agencies like EPA are required to make “promptly available” records that are “reasonably describe[d]” in a request. 5 U.S.C. § 552(a)(3)(A); *see also* 40 C.F.R. § 2.102(c). The “reasonably describes” standard “‘makes explicit the liberal standard for identification that Congress intended.’” *Nat’l Sec. Counselors v. C.I.A.*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting S. Rep. No. 93–854, at 10 (1974)). *See also* *Kowalczyk v. Dep’t of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (“A request reasonably describes records if ‘the agency is able to determine precisely what records are being requested.’” (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982))). FOIA requests made to EPA should, “[w]henever possible, . . . include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter.” 40 C.F.R. § 2.102(c) (emphasis added).

Our October 17 request easily satisfies this “liberal standard” because, at a minimum, our request includes specific information regarding the “date,” “author[s],” “recipient[s],” and “subject matter” of the documents sought. *Id.* As our request explains, we are merely seeking communications between EPA officials and *specific* organizations and *specific* States regarding a *specific* settlement agreement, as well as other documents regarding that specific settlement. *See* Exhibit A at 2. The request identifies each of these organizations and States by name. *Id.* Moreover, the requested documents are further narrowed by a list of terms that will help ensure those documents relate to the specific settlement agreement referenced therein. *Id.* at 2-3. And the description of the forms of the documents being sought is merely a standard description of the forms that agency documents regarding this issue may take.

The Niebling Letter vaguely asserts that these specific identifying facts are insufficient to permit EPA officials to identify these records. The letter fails to explain, however, “what additional information [the requesters] need to provide” to satisfy the requirement, given that all of the parties to the settlement are specifically identified. 40 C.F.R. § 2.102(c). For example, it is entirely beyond the reasonable knowledge of any requester what personnel EPA assigned to communicate with parties to the settlement.

The Niebling Letter also appears to suggest that the “potentially . . . voluminous documents” subject to the request may be grounds for denying the request under 5 U.S.C. § 552(a)(3)(A). However, the number of records requested is irrelevant for purposes of the “reasonably describes” standard. *Tereshchuk v. Bureau of Prisons*, -- F. Supp. 3d --, 2014 WL 4637028, at *7 (D.D.C. Sept. 16, 2014) (citing *Yeager*, 678 F.2d at 326; FOIA Update Vol. IV, No. 3, at 5 (“The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552(a)(3)(A)”))).

Finally, the Niebling Letter takes issue with the use of the phrases “otherwise associated with” and “in any way” in our October 17 request, as well as the search term “literal.” While we continue believe that those phrases and terms would assist the agency in identifying documents discussing the specific settlement agreement at issue, we hereby modify our request to delete those phrases and search term. As modified, the request is now:

We request that you provide a copy of any of the following documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter between EPA officials and any persons representing one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—that contain any of the following words:

- “settlement”
- “111”
- “111(b)”
- “111(d)”
- “7411”
- “7411(b)”
- “7411(d)”
- “42 U.S.C § 7411”
- “42 U.S.C § 7411(b)”
- “42 U.S.C § 7411(d)”
- “power plants”
- “EGUs”
- “coal”
- “coal-fired”
- “carbon dioxide”
- “CO₂”
- “greenhouse”
- “GHG”
- “AEP v. Connecticut”
- “AEP”
- “New Jersey v. EPA”

We further request that you provide a copy of any of documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings

and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter, which references the 2011 Settlement Agreement, without regard to the recipient or author of the document.

* * *

We reiterate both our requested fee waiver and the description of the requested records, as modified above. *See* 5 U.S.C. § 552(a)(4)(A); *see also* 40 C.F.R. § 2.107(l), and (c). As requested in the Niebling Letter, because multiple parties are listed as co-requestors, Patrick Morrissey, the Attorney General of the State of West Virginia, confirms that he is the authorized representative for communications regarding this FOIA request. Thank you in advance for your prompt cooperation in this important matter.

Sincerely,



Patrick Morrissey
West Virginia Attorney General



Jon Bruning
Nebraska Attorney General



Derek Schmidt
Kansas Attorney General



E. Scott Pruitt
Oklahoma Attorney General



Jack Conway
Kentucky Attorney General



Alan Wilson
South Carolina Attorney General



James D. "Buddy" Caldwell
Louisiana Attorney General



Peter K. Michael
Wyoming Attorney General

cc:

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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hq.foia@epa.gov

EXHIBIT A



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

October 17, 2014

(304) 558-2021
Fax (304) 558-0140

Via Certified Mail & Email

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request From The States Of West Virginia, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, and Wyoming, and the Commonwealth of Kentucky, Concerning EPA's 2011 Settlement Agreement, Docket No. EPA-HQ-OGC-2010-1057

Dear Administrator McCarthy:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552(a) *et seq.* (the "Act"), for information concerning communications relating to the implementation of a 2011 settlement agreement (the "2011 Settlement Agreement") between the Environmental Protection Agency ("EPA") and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. *See* Dkt. No. EPA-HQ-OGC-2010-1057. The rules that EPA has proposed pursuant to the 2011 Settlement Agreement threaten to cause severe harm to the citizens of our States, forcing coal miners to lose their jobs and leading energy prices to skyrocket.

In the 2011 Settlement Agreement, EPA committed to proposing standards of performance under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, for new, modified, and existing power plants that include emission standards for carbon dioxide. *See* Dkt. Nos. EPA-HQ-OGC-2010-1057-0002; EPA-HQ-OGC-2010-1057-0036. EPA has heretofore abided by this settlement, proposing standards of performance for new coal-fired power plants (79 Fed. Reg.

1430 (Jan. 8, 2014)) modified coal-fired power plants (79 Fed. Reg. 34,960 (June 18, 2014)), and existing coal-fired power plants (79 Fed. Reg. 34,830 (June 18, 2014)). These proposed rules are rife with numerous legal defects. *See, e.g.*, Formal Comment Letter on Proposed Performance Standards for New Power Plants from the State of West Virginia et al. to Gina McCarthy, Adm'r, EPA (May 9, 2014); Letter on EPA's Section 111(d) Authority from Patrick Morrissey, Att'y Gen. of W. Va., to Gina McCarthy, Adm'r, EPA (June 6, 2014); Brief for the State of West Virginia et al. as Amicus Curiae Supporting Petitioner, *In re: Murray Energy Corporation*, No. 14-1112, 2014 WL 2885937 (D.C. Cir. June 25, 2014); Petition for Review, *State of West Virginia et al. v. EPA*, No. 14-1146 (D.C. Cir. Aug. 1, 2014).

We request that you provide a copy of any of the following documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter between EPA officials and any persons representing, or otherwise associated with, one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—that contain any of the following words:

- “settlement”
- “111”
- “111(b)”
- “111(d)”
- “7411”
- “7411(b)”
- “7411(d)”
- “42 U.S.C § 7411”
- “42 U.S.C § 7411(b)”
- “42 U.S.C § 7411(d)”
- “power plants”
- “EGUs”
- “coal”
- “coal-fired”
- “carbon dioxide”
- “CO₂”
- “greenhouse”
- “GHG”
- “AEP v. Connecticut”
- “AEP”

- "New Jersey v. EPA"
- "literal"

We further request that you provide a copy of any of documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter, which references the 2011 Settlement Agreement in any way, without regard to the recipient or author of the document.

We also request that you waive any applicable fees. As you know, a fee waiver is appropriate when disclosure is in the public interest and not in a commercial interest. *See* 45 C.F.R. § 5.45(a) *et seq.* This request for information about an important aspect of your agency's implementation of the 2011 Settlement Agreement unquestionably satisfies these requirements. Disclosure of the requested documents is directly in the public interest. The actions that EPA has taken pursuant to the commitments made in the 2011 Settlement Agreement will affect thousands of West Virginians, either through jobs in the coal mining or power generation sector or by way of higher electricity rates. A fee waiver is thus clearly appropriate, and we reserve our right to appeal a denial of such waiver.

In light of the importance of this inquiry to the public, we respectfully request that you disclose all responsive documents as soon as possible, but no later than 20 business days from receipt of this letter, as required under the Act. Should you assert that any of the material is exempt from disclosure, please redact the allegedly exempt sections and provide the remaining material. In each instance, please describe the redacted material in detail and specify the statutory bases for refusing to disclose the material. We reserve the right to appeal the withholding or deletion of any information.

Thank you in advance for your prompt cooperation in this important matter.

Sincerely,



Patrick Morrissey
West Virginia Attorney General



Jon Bruning
Nebraska Attorney General



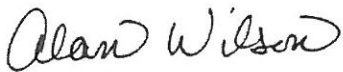
Derek Schmidt
Kansas Attorney General



E. Scott Pruitt
Oklahoma Attorney General

A handwritten signature in cursive script, appearing to read "Jack Conway".

Jack Conway
Kentucky Attorney General

A handwritten signature in cursive script, appearing to read "Alan Wilson".

Alan Wilson
South Carolina Attorney General

A handwritten signature in cursive script, appearing to read "James D. Caldwell".

James D. "Buddy" Caldwell
Louisiana Attorney General

A handwritten signature in cursive script, appearing to read "Peter K. Michael".

Peter K. Michael
Wyoming Attorney General